



November 9, 2017

Marlene H. Dortch, Esq.  
Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington DC 20554

Re: Written Ex Parte Communication, MB Docket Nos. 14-50, 09-182, 04-256, 15-216, 10-71

Dear Ms. Dortch:

The National Association of Broadcasters (NAB) writes in response to pay TV providers' recent expression of concern in the quadrennial broadcast ownership proceeding about the subscription prices they charge their customers. This concern is widely shared by pay TV consumers, who yet again have ranked pay TV service dead last in customer satisfaction.<sup>1</sup> But instead of accepting responsibility for charging high prices for decades – long before pay TV operators made a single retransmission consent cash payment – and addressing their ongoing failures to meet consumer needs, the pay TV industry is now attempting to cast blame on local TV station ownership. NAB urges the Commission to view this effort as the ruse that it is. As discussed in detail below, the pay TV industry's claims lack any legal or factual basis, and its proposals to limit common ownership of local TV stations – especially on the spurious grounds that doing so would somehow reduce pay TV subscription rates – should be met with extreme skepticism and rejected out of hand.

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<sup>1</sup> American Customer Satisfaction Index (ACSI), *ACSI: Wireless Competition Boosts Customer Satisfaction While Pay TV Fades* (May 23, 2017) available at: <http://www.theacsi.org/news-and-resources/press-releases/press-2017/press-release-telecommunications-2017>.

According to ACSI's recent report, "[c]ustomer satisfaction with subscription television is down 1.5 percent to 64, tied with internet service providers for last place among 43 industries tracked." *Id.* ACSI Chairman and Founder Claes Fornell observed: "The threat of competition does not appear to be encouraging improvement fast enough for pay TV . . . . Customer service remains *abysmal*, and viewers are continuing to switch over to streaming services with much higher customer satisfaction. More than half a million subscribers defected from cable and satellite providers during the first quarter – the largest loss in history." *Id.* (emphasis added).

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A battle cry of “no more consolidation” sounds disingenuous, at best, coming from the behemoth pay TV industry and its associations.<sup>2</sup> This is an industry whose top four operators now serve 80.2% of all subscribers nationwide,<sup>3</sup> as compared to only 50.5% in 2002.<sup>4</sup> Pay TV providers’ market capitalizations dwarf those of even the largest local broadcast groups.<sup>5</sup> Some of the most dominant providers enjoyed revenues of \$163.8 billion (AT&T), \$40 billion (Charter) and \$15.1 billion (DISH) in 2016.<sup>6</sup> And as the pay TV industry has become more concentrated nationally, regionally and locally, customer prices have consistently risen faster than the Consumer Price Index.<sup>7</sup>

From this industry comes a belated demand that the Commission deny NAB’s request for reconsideration of the retention of the ban on owning more than one top-four-ranked broadcast TV station in a market.<sup>8</sup> Alternatively, ATVA just last week proposed that the FCC

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<sup>2</sup> American Television Alliance (ATVA) “partners” include some of the largest communications companies, such as AT&T Inc. (AT&T), Verizon Communications, Inc. (Verizon), Charter Communications, Inc. (Charter), and DISH Network Corporation (DISH). See ATVA, Alliance Partners, available at: <http://www.americantelevisionalliance.org/partners/>.

<sup>3</sup> Q2 2017 data from Kagan, a media research group within S&P Global Market Intelligence. See also Mike Farrell, *Eat or Be Eaten*, Multichannel News (Aug. 17, 2015), available at: [http://www.multichannel.com/sites/default/files/public/pdf/Coverstory\\_8\\_17\\_15\\_0.pdf](http://www.multichannel.com/sites/default/files/public/pdf/Coverstory_8_17_15_0.pdf) (comparing the top 25 pay TV providers in 1985, 1995, 2000 and 2015 and revealing extraordinary consolidation during the past 30 years: in 1985, the four largest pay TV companies had only 9.9 million subscribers, which rose to 30 million in 1995, 43.54 million in 2000, and 79.7 million in 2015, estimating the total subscribership of Charter following its then-pending acquisition of Time Warner Cable (TWC) and Bright House Networks).

<sup>4</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Report, 17 FCC Rcd 26901, 26958 (2002).

<sup>5</sup> See Comments of NAB in MB Docket No. 15-216 (Dec. 1, 2015) at 19 (showing that the market capitalizations of AT&T, Verizon, Comcast, Charter and DISH to be, respectively, 201, 182, 142, 72 and 27 times greater than the market capitalizations of Nexstar or Scripps).

<sup>6</sup> See AT&T, SEC Form 10-K for the Year Ended December 2016 at 2, 6; Charter, SEC Form 10-K for the Year Ended December 2016 at 40; DISH, *DISH Network Reports Fourth Quarter, Year-End 2016 Financial Results*, Press Release, available at: <http://about.dish.com/press-release/financial/dish-network-reports-fourth-quarter-year-end-2016-financial-results> (Feb. 22, 2017).

<sup>7</sup> From 1995-2015, the average price of expanded basic service grew at a compound annual rate of 5.9 percent, compared to a 2.2 percent annual increase in general inflation as measured by the Consumer Price Index over the same period. See Report on Cable Industry Prices, DA 16-1166 (MB Oct. 16, 2016) at Attachment 7.

<sup>8</sup> See, e.g., Letter from Michael Nilsson, Counsel to ATVA to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 15-216, 10-71, 14-50 et al. (Feb. 27, 2017); Letter from Michael Nilsson, Counsel to ATVA to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 15-216, 10-71, 14-50 et al. (Aug. 17, 2017) at 1-2 (ATVA Aug. 17 Ex Parte). ATVA’s February 2017 filing

adopt a prophylactic rule requiring local TV station merger applicants to make a first-ever demonstration that their proposed transaction will satisfy one of three factors, each designed to give pay TV providers an even greater advantage over local stations when negotiating to carry broadcast signals.<sup>9</sup> The proposals to continue the top-four prohibition and ATVA's latest proposal should both be rejected as unsupported by record evidence.

First, there is no record basis in any proceeding for the pay TV industry's claims that it will be at the mercy of broadcasters owning more than one local TV station in a market during retransmission consent negotiations. As the Department of Justice (DOJ) recently found in the context of the Charter/TWC/Bright House merger, video marketplace dynamics give consolidated pay TV providers substantial negotiating leverage over programmers. Observing that video programmers (including broadcasters) rely on distributors to reach consumers, DOJ explained that unless a programmer can secure pay TV carriage to

reach a sufficient number of consumers, the programmers will be unable to earn enough revenue in licensing or to attract enough advertising revenue to generate a return on their investments in content. For this reason, video programmers prefer to have as many video programming distributors as possible carry their networks, and particularly seek out the largest [pay TV operators] that reach the most customers. If the programmer is unable to agree on acceptable terms with a particular distributor, the programmer's content will not be available to that distributor's customers. This potential consequence gives the largest [pay TV operators] significant bargaining leverage in their negotiations with programmers.<sup>10</sup>

As NAB has previously explained, even "smaller" cable operators often serve a large share of subscribers in local markets, giving broadcasters the same incentives to secure carriage on

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represents its very first in response to the FCC's April 2014 request for comment on the top-four ban. See *2014 Quadrennial Regulatory Review*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, ¶41 (2014)(seeking comment on the top-four prohibition). NCTA's first engagement with this proceeding is documented in a late-filed notice of ex parte meetings with the staff of Commissioners O'Rielly and Carr. See Letter from Rick Chessen, Senior Vice President, Law and Regulatory Policy, NCTA—The Internet and Television Association (NCTA), to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 15-216, 10-71, 14-50 *et al.* (filed Oct. 25, 2017, but documenting meetings held one full week earlier, on Oct. 18). ATVA and NCTA did not respond to the FCC's request for comment on the top-four prohibition or to NAB's filings supporting elimination of the ban, and did not timely oppose NAB's petition for reconsideration urging elimination of the ban.

<sup>9</sup> See Letter from Michael Nilsson, Counsel to ATVA to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 15-216, 10-71, 14-50 *et al.* (Nov. 3, 2017) (ATVA Nov. 3 Ex Parte). See *also* Letter from Rick Chessen, Senior Vice President, Law and Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 15-216, 10-71, 14-50 *et al.* (Nov. 6, 2017) at 3.

<sup>10</sup> DOJ, Competitive Impact Statement at 5, *U.S.A. v. Charter Communications, Inc. et al.*, Civil Action No. 1:16-cv-00759 (RCL) (D.D.C. May 10, 2016).

their pay TV systems.<sup>11</sup> In light of the DOJ analysis and the fact that the same incentives exist with regard to smaller operators, the Commission should summarily reject repeated claims by pay TV providers that they lack leverage sufficient to freely negotiate retransmission consent with a broadcaster that owns more than one top-four station.

The Commission also should reject the pay TV industry's effort to conflate the FCC's limited authority to ensure that retransmission consent negotiations are conducted in good faith<sup>12</sup> with the FCC's affirmative obligations under the Communications Act of 1934 (Act) and Section 202(h) of the 1996 Telecommunications Act to have a public interest basis for, and to update, its broadcast ownership rules. In conflating these two different sets of laws and rules, pay TV providers visibly strain to claim that eliminating the top-four ownership restriction would be "reversing" a previous FCC finding about retransmission consent negotiations without a reasoned explanation, contrary to the Administrative Procedure Act.<sup>13</sup>

Specifically, pay TV providers assert that eliminating the top-four prohibition in the quadrennial ownership proceeding would reverse the FCC's previous determination – made in a proceeding concerning its retransmission consent good faith rules and pursuant to its limited authority under Section 325 of the Act – that the joint negotiation of retransmission consent by *non*-commonly owned top-four stations in the same market violates the good faith standard.<sup>14</sup> According to pay TV providers, the Commission did not prohibit joint negotiations among *commonly* owned top-four stations in 2014 only because such combinations were then prohibited by FCC rules.<sup>15</sup> This claim is specious.

The contention that no one ever conceived of such a thing as a local TV top-four combination runs completely contrary to both facts and law cited by ATVA. Although combinations among top-four stations are rare, they do exist (because of rule waivers for failing and failed stations, grandfathering or other circumstances). The Commission and commenters were

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<sup>11</sup> See, e.g., Comments of NAB in MB Docket No. 15-216 (Dec. 1, 2015) at 16, citing SNL Kagan, MediaCensus Estimates—Q2 2015 (for example, Cable One controls 51% of the entire pay TV market in Biloxi-Gulfport, MS, and Suddenlink controls 60.1% of the pay TV market in Parkersburg, WV, 59.9% in Victoria, TX, and between 40-50% in a number of other DMAs). NAB also pointed out that, following the Charter/TWC/Bright House merger, a single pay TV provider would control 40% or more of the *total* pay TV market in 112 DMAs, or 53% of all DMAs in the country). *Id.*

<sup>12</sup> See, e.g., *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014) (*2014 Retrans Order*), Statement of Commissioner Ajit Pai ("Also crucial to my vote is that the Commission today carefully remains within its limited authority over retransmission consent.").

<sup>13</sup> See, e.g., ATVA Aug. 17 Ex Parte at 5-6; Letter from Rick Chesson, Senior Vice President, Law and Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 15-216, 10-71, 14-50 *et al.* (Nov. 6, 2017) at 2.

<sup>14</sup> See *2014 Retrans Order*.

<sup>15</sup> ATVA Aug. 17 Ex Parte at 4.

well aware of this at the time of the *2014 Retrans Order*. Otherwise, the Commission would have had no reason to repeatedly use the phrases “not commonly owned” (19 times) or “separately owned” (28 times) in the order. Indeed, one of the very studies cited by ATVA here (and by the Commission in the *2014 Retrans Order*) included some commonly owned top-four stations located in the same market.<sup>16</sup> There is no basis for ATVA’s claim that top-four combinations weren’t addressed only because nobody considered the possibility that they could exist.

Moreover, the Commission in 2014 directly addressed the question of whether to apply the ban on joint negotiations to commonly owned top-four stations when it held that it *would not* ban such joint negotiations. The Commission expressly found that joint negotiation by commonly owned stations “does not present the same competitive concerns as joint negotiation by separately owned stations.”<sup>17</sup> The Commission further explained that the broader public interest analysis it undertakes in deciding what rules will make local television markets sufficiently competitive would govern: “In cases of common ownership, the local television ownership rule has permitted a combination of interests that is consistent with the rule’s goal of ensuring competition among television broadcast stations in a given local television market.”<sup>18</sup> If the Commission now determines in the quadrennial ownership proceeding, as it should, that the local TV ownership rule must be reformed under applicable Communications Act and Section 202(h) standards, and that case-by-case review will govern proposed top-four station combinations and will promote competition in local TV markets, that determination should govern. The FCC’s competition analysis considers what rules and policies will ensure that broadcasting has an “opportunity to compete and thrive in the vibrant and fast-changing media marketplace” and to serve consumers by investing “in local news and public interest programming and improv[ing] their overall service to those communities.”<sup>19</sup> It does not, and should not, take account of what would help pay TV providers increase their bottom lines.

The Commission also should reject ATVA’s remarkably belated call for broadcasters proposing a merger to jump a pay TV-centric hurdle on top of the existing generally applicable public interest standard. This proposal would create a layer of regulatory overlay

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<sup>16</sup> ATVA Nov. 3 Ex Parte at 3, note 13, apparently citing *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effects on Retransmission Consent Fees*, William P. Rogerson, May 18, 2010, Attachment to ACA Comments in MB Docket No. 10-71 (May 18, 2010) (“One examined whether top-four stations ‘are able to act as a single entity for purposes of negotiating retransmission consent prices,’ noted that ‘[i]n some cases, this occurs *because the stations are under common ownership*’”) (emphasis in ATVA Nov. 3 Ex Parte).

<sup>17</sup> *2014 Retrans Order*, 29 FCC Rcd at 3368 ¶ 24, note 92.

<sup>18</sup> *Id.*

<sup>19</sup> Draft Order in MB Docket No. 14-50, at ¶ 1 available at: [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-347453A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-347453A1.pdf).

that is unwarranted and unprecedented.<sup>20</sup> In numerous pay TV mergers, the Commission has analyzed whether the proposed transaction could result in various public interest harms under its general public interest authority. The Commission evaluates what harms might result from a particular merger, whether the potential harms are outweighed by the benefits of a transaction, and whether conditions can mitigate against potential harms. While precedent is available to guide merger applicants, commenters and the agency, the Commission does not maintain and publish a list of boxes that pay TV providers must check or a rigid checklist that dictates its case-by-case analysis. Broadcasters wish to be evaluated under the same standard for purposes of local TV transactions. We expect precedent to develop over time about the issues that are most important to the FCC's analysis – and presumably, those issues will be truly consumer-focused and not pay TV giveaways masquerading as something else.

If broadcasters were required to make the threshold showings proposed by ATVA, the Commission should re-evaluate its standards applicable to all mergers. Under such new merger standards, pay TV providers should be required to demonstrate, as a threshold matter, that the proposed merged entities will not: (1) increase consumer rates; (2) reduce the prices they pay programmers, including broadcasters, for carriage of their programming/signals so that investment in programming – especially critical local news and information programming – is not artificially reduced by their exercise of market power; (3) include hidden fees to consumers; (4) continue to double-charge consumers by imposing a “broadcast fee,” for which consumers were already being charged by the pay TV providers;<sup>21</sup> (5) overcharge for set-top box rentals;<sup>22</sup> and (6) not seek to redline consumers' video programming.<sup>23</sup>

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<sup>20</sup> Additionally, ATVA's proposed standards themselves presuppose that retransmission consent fees are somehow “too high.” It fails to account for the very strong likelihood that retransmission consent compensation has been – and still is – artificially depressed by undue restrictions on broadcasters' ability to enter into efficient combinations, particularly while cable and other pay TV entities have increased their share of local markets and their national reach.

<sup>21</sup> See, e.g., Chris Mills, *Charter increases already-ridiculous fee because there's nothing you can do to stop it*, BGR (July 26, 2017), available at: <http://bgr.com/2017/07/26/charter-spectrum-broadcast-tv-fee-increase-vs-streaming/>. See also *Michael Song v. Charter et al.*, Case No. 37-2016-00039501-CU-BT-CTL (filed Nov. 9, 2016) (Charter “is engaging in a massive illegal scheme of falsely advertising and promising its cable television service plans for much lower prices than it actually charges.”).

<sup>22</sup> See, e.g., Chris Morran, *If Cable Companies Lose Set Top Box Money They'll Just Charge More for TV*, Consumerist (Mar. 3, 2016), available at: <https://consumerist.com/2016/03/11/analyst-if-cable-companies-lose-set-top-box-money-theyll-just-charge-more-for-tv/>.

<sup>23</sup> Letter from Michael Nilsson, Counsel to the American Cable Association, to Marlene H. Dortch, MB Docket No. 16-41 (Aug. 26, 2016) at 4.

NAB renews its call for elimination of the top-four prohibition in its local TV rule, for the reasons discussed extensively in the record in this proceeding. For the many reasons discussed primarily in the retransmission consent proceeding, the Commission also should not give pay TV providers yet another advantage over broadcasters in negotiations for retransmission consent by including their latest ask in the evaluation of broadcast mergers.<sup>24</sup>

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Rick Kaplan', with a long horizontal line extending to the right.

Rick Kaplan  
General Counsel and Executive Vice President  
Legal and Regulatory Affairs  
National Association of Broadcasters

cc: Chairman Ajit Pai, Commissioner Michael O’Rielly, Commissioner Brendan Carr, Commissioner Mignon Clyburn, Commissioner Jessica Rosenworcel, Matthew Berry, Alison Nemeth, Brooke Ericson, Nirali Patel, J. David Grossman, Kate Black

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<sup>24</sup> NAB has thoroughly refuted claims that pay TV providers need government regulatory assistance to negotiate retransmission consent agreements. See, e.g., NAB Written Ex Parte, MB Docket Nos. 15-216, 10-71 (May 12, 2016); NAB Comments, MB Docket No. 15-216 (Dec. 1, 2015). Economic studies in fact have shown that the opposite is true. See Kevin W. Caves and Bruce M. Owen, *Bundling in Retransmission Consent Negotiations: A Reply to Riordan*, at 19-21, attached to NAB Written Ex Parte, MB Docket Nos. 15-216, 10-71 (Feb. 16, 2016) (incorporated into quadrennial review proceedings via NAB Written Ex Parte, MB Docket Nos. 14-50, 09-182 (June 6, 2016)) (the unconcentrated and fragmented nature of the upstream programming market, coupled with a highly concentrated pay TV market, potentially make a broadcaster’s “failure to secure carriage with even a single [operator]” the “difference between profit and loss” and therefore obtaining a pay TV distribution agreement is “a ‘must have’ input from the broadcaster’s point of view”).